IN THE

Supreme Court of the United States

October Term, 1949

No. 28

JOHN WALTER GAMBLE, JR., *Petitioner*,

vs.

LOUISVILLE & NASHVILLE RAILROAD CO., ET AL.

No. 29

JOHN S. HAYNES, *Petitioner*,

vs.

CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY COMPANY, ET AL.

On Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit

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Dated at Toledo, Ohio,
October 8 1949.

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BRIEF OF INTERVENING DEFENDANTS-RESPONDENTS

OPINIONS BELOW

The United States District Court for the Eastern District of Kentucky, at London, entered its order dismissing each case without opinion. (O. R. 18; H. R. 15:)[2] The opinion of the United States Court of Appeals for the Sixth Circuit in No. 28 (O. R. 21-23) is reported at 170 F. (2d) 1008; and that court's *per curiam* opinion in No. 29 (H. R. 17) is reported at 171 F. (2d) 128.

[1] The petition named Southern Railway System as respondent. By order of this Court, dated May 2, 1949, the name now appearing was substituted.

[2] Reference to the record in No. 28, *John Walter Oakley, Jr. vs. Louisville & Nashville Railroad Co., et al.*, will be indicated by "O. R.", and in No. 29 *John S. Haynes vs. Cincinnati, New Orleans and Texas Pacific Railway Company, et al.*, by "H. R."

JURISDICTION

The judgments of the Court of Appeals were entered on November 22, 1948. (O. R. 21; H. R. 17.) The petition for writs of certiorari was filed on February 19, 1949, and was granted on April 4, 1949 (O. R. 23; H. R. 18). The petitioners invoke the jurisdiction of this Court under 28 U. S. C. 1254 (1).

COUNTER STATEMENT OF QUESTIONS PRESENTED

1. Whether the employment status and seniority to which a veteran claims to be entitled by virtue of Section 8 of the Selective Training and Service Act of 1940, as amended, must be accorded to him for a period of more than one year (a) when there is no showing of any contractual right of the veteran to hold or retain such status and seniority, and (b) when it appears that the claimed status and seniority are different from and inconsistent with the status and seniority to which he would be entitled under the only contractual provisions governing the employment of the veteran and his fellow employees.

2. Whether Section 8 of the Selective Training and Service Act entitles a veteran, who has been restored to the same position in private employment which he left to enter the armed forces, with full seniority credit in that position for the period of his absence, to be given a completely different position and seniority status because he claims he could or would have achieved that different position and status had he remained "on the job" in the active service of his employer, instead of being absent in the armed forces; or is he to be considered as having been on furlough or leave of absence, instead of "on the job," during the period of his military service, and, upon being restored to his former position without loss of seniority,

to be accorded only the same rights as those accorded to non-veteran employees returning to similar positions from leaves of absence for comparable periods.

STATUTE INVOLVED

The questions presented in this case relate to the proper interpretation to be given to the following portions of Section 8 of the Selective Training and Service Act of 1940, as amended, (54 Stat. 885, 50 U. S. C. App. Sec. 301 *et seq.*) as amended by the Act of July 28, 1942 (56 Stat. 723), the Act of December 8, 1944 (58 Stat. 798), and the Act of June 29, 1946 (60 Stat. 341):

"Sec. 8 (a) Any person inducted into the land or naval forces under this Act for training and service, who, in the judgment of those in authority over him, satisfactorily completes his period of training and service under section 3 (b) shall be entitled to a certificate to that effect upon the completion of such period of training and service, which shall include a record of any special proficiency or merit attained. • • •

"(b) In the case of any such person who, in order to perform such training and service, has left or leaves a position, other than a temporary position, in the employ of any employer and who (1) receives such certificate, (2) is still qualified to perform the duties of such position, and (3) makes application for reemployment within ninety days after he is relieved from such training and service — —

"(B) if such position was in the employ of a private employer, such employer shall restore such person to such position or to a position of like seniority, status and pay unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so; • • •

"(c) Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of

subsection (b) shall be considered as having been on furlough or leave of absence during his period of training and service in the land or naval forces shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such service, and shall not be discharged from such position without cause within one year after such restoration."

STATEMENT OF THE CASE

In each of the cases presented the petitioner is an honorably discharged veteran of World War II who asserts that he has not been accorded certain rights in connection with his employment to which he claims to be entitled by virtue of the provisions of Section 8 of the Selective Training and Service Act of 1940, as amended. In each instance the petitioner made application for reemployment within the 90-day period prescribed by the Act, and was reemployed; but each claimed that he was not accorded the proper employment status and seniority.

John Walter Oakley, Jr., the petitioner in No. 28, was employed by respondent Louisville & Nashville Railroad Company (hereinafter referred to as L. & N.) as a machinist in its Loyall, Kentucky, shops prior to his entry into the armed forces. As an incident of that position, he possessed certain seniority rights under a collective bargaining agreement between the respondent System Federation No. 91 of the Railway Employes' Department of the American Federation of Labor, the statutory representative of his craft or class (O. R. 5-6, 11—Admission No. 22), and the respondent L. & N.

Under that agreement, seniority rights were confined to the point on the railroad where the individual was employed, and an employee's seniority date was the date on which he first started to work at that point. (O. R. 6, 11—Adm. No. 23.) Also, under that agreement, men who were furloughed (laid off in force reduction) were to be given preference if they wished to transfer to another point on the railroad where additional men were needed, and would still retain their furloughed status at their "home point." Thus, if additional forces were again needed at their home point, they would be recalled in order of their old seniority, and could then elect whether to go back or remain at the point to which they had transferred. (O. R. 6, 11—Adm. No. 23.)

While Oakley was in the armed forces, a number of machinists senior to him were laid off in a force reduction at the Loyall shops. (O. R. 4, 10—Adm. No. 6.)[3] This condition still prevailed at Loyall when Oakley received his discharge from the armed forces and applied for reemployment, so that there was no work available to which he was entitled to be assigned by virtue of his seniority at that point. (O. R. 5, 10—Adm. No. 16.) However, throughout his service in the armed forces, and at the time he applied for reemployment, Oakley had retained and was accorded seniority at Loyall dating from July 6, 1943, the date he started working as a machinist at that point (O. R. 13—Affidavit of H. Feather); so that, upon applying for reemployment, he was restored to his former position at Loyall as a furloughed machinist, with his old seniority date (thus getting "accumulated seniority" for the period spent in the armed forces), and was entitled to be recalled to work at Loyall in accordance with his seniority (O. R. 5, 10—Adm. No. 18.).

[3] The railroad's Loyall shop was not transferred to Corbin, Kentucky as stated by petitioners. (Petitioners' Brief, p. 6.)

Having been thus restored to his former position, on July 18, 1946, Oakley filed an application for a job as machinist at Corbin, Kentucky, in accordance with the aforesaid provision of the collective bargaining agreement giving furloughed men preference to transfer to other points on the railroad where men were needed. However, in connection with his application for such transfer, he asserted that had he not been in the armed forces, but been working at Loyall when the force reduction took place there on July 1, 1945, he would at that time have applied for a transfer to Corbin, and received a seniority date of July 1, 1945, at that point. For that reason he was requesting that he be given seniority at Corbin retroactive to July 1, 1945. (O. R. 4, 10—Adm. No. 10.) This latter request was denied because the collective bargaining agreement provided that seniority in a new position commences on the date on which the employee first starts to work in such new position. His application for transfer was granted, however. He started working as a machinist at Corbin on July 18, 1946, and was placed on the machinists' seniority roster at Corbin with seniority as of that date. (O. R. 5, 10—Adm. No. 12 and 13.)

The complaint does not allege, nor does it anywhere appear in the record of this case, that any other employee of the respondent L. & N., either veteran or non-veteran, has ever been accorded the privilege of transferring to a new point of employment, and a new position with a retroactive seniority date at the new point, or that any employee has ever been accorded a seniority date prior to the date on which he commenced work in a new position. As we have noted, the applicable collective bargaining agreement prohibits such a practice. It is not claimed that any non-veteran employee laid off in a force reduction, while on a leave of absence for sickness or other reason, was entitled, upon reporting back to work and finding himself on

the furlough list, to transfer to another point with a seniority date at the new point retroactive to the date he claims he would have transferred there had he not been on leave of absence when the force reduction occurred. And it is conceded that none of the employees on the machinists' roster at Corbin over whom Oakley seeks to be advanced hold seniority dates prior to the dates on which they started to work as machinists at Corbin. (O. R. 5, 21—Adm. No. 21.) Nowhere in the complaint is there any allegation as to the source of the right claimed by Oakley. The action is predicated solely upon the Selective Training and Service Act and no contractual rights of any sort are alleged.

The only relief sought by Oakley in this action is that he be accorded seniority as a machinist at Corbin, Kentucky, dating from July 1, 1945, instead of from July 18, 1946, the day on which he first started to work as a machinist at that point. No claim to monetary damages was asserted.

John S. Haynes, the petitioner in No. 29, alleged in his complaint that prior to his enlistment in the armed forces, on January 1, 1942, he had been employed by respondent Cincinnati, New Orleans and Texas Pacific Railway Company, (hereinafter referred to as C. N. O. & T. P.) as a machinist helper at its shops at Somerset, Kentucky. Upon his return from the armed forces he applied for reemployment, and was reemployed in the same classification, that of machinist helper, on November 16, 1945.

In his complaint Haynes states "that said employment of machinist helper was not the employment to which he was entitled had he been given the seniority that he would have had, had he remained in the employment of the company during the period of his service in the Armed Forces." (H. R. 2.) It is further alleged that six machinist helpers

"junior in seniority" to Haynes had been "promoted" to positions as helper apprentices during his absence in the armed forces, and that had he not entered the armed forces he would have been similarly promoted "not later than February 1, 1943." (H. R. 2.) The following relief is requested in the prayer of the complaint: (1) that the court adjudge and decree that Haynes is entitled to be restored to "the seniority status" that he "would have had in his employment with the defendant company" had he not entered the armed forces; (2) that the court adjudge and decree that Haynes was entitled to be reemployed as a helper apprentice (rather than in his former position as a machinist helper) and entitled to all pay increases given helper apprentices since February 1, 1943; and (3) that Haynes recover "the increase in wages which he would have been entitled to receive had he been reemployed as a helper apprentice" with pay increases from February 1, 1943. (H. R. 2-3.)[4]

The complaint contains no allegation that any seniority *rights* (as compared with "seniority," which is merely length of service) pertained to the position of machinist helper which Haynes left to enter the armed forces. While it purports to convey the inference, in referring to the promotion of men "junior in seniority to himself," that his seniority as a machinist helper entitled Haynes to be promoted to a position as helper apprentice, the complaint is silent as to the source of any such right. The action is predicated solely upon the Selective Training and Service Act, and no contractual rights of any sort are alleged.

For purposes of clarification some reference should perhaps be made to the answer of the respondent C. N. O. & T. P. wherein it is alleged that certain contractual

[4] The wage claim asserted appears to encompass the periodic raises given helper apprentices as they progress in their apprentice training program. See paragraph 9 of the complaint, where Haynes states that he "would have received a like raise every six months thereafter." (H. R. 2.)

rights and incidents did pertain to the position of machinist helper which Haynes left to enter the armed forces. (H. R. 6-8.) Although in this case we believe that in passing upon the motion to dismiss the District Court was limited to considering the allegations of the complaint, yet it may be urged that the answer of said respondent may be taken advantage of by petitioner, and that it cured the failure of the complaint to allege any contractual basis for petitioner's claim. If such contention be advanced, then it should be noted that under the contractual provisions, established rules, and custom alleged in said answer, petitioner Haynes was not eligible for promotion to a position as helper apprentice either at the time he entered the armed forces or upon his return and reemployment; that he did not become eligible therefor until September of 1946; that since September of 1946 there have been no vacancies in the classification of helper apprentice to which he could have been promoted; and that irrespective of the question of his eligibility, employees of said respondent returning from leave of absence were not entitled to be given promotions which had been awarded to junior employees during their absence.

Both the District Court and the Court of Appeals below took the view that in each of the cases at bar the petitioner's right to the position and seniority claimed, if it existed at all, was necessarily a special statutory right, and that its duration was therefore limited to one year after the date of petitioner's reemployment. Accordingly both actions were dismissed, since the relief sought could not be granted without holding that a statutory right to the position and seniority claimed still existed after the expiration of the one-year period. In neither case did the courts below pass upon the question of whether the Selective Training and Service Act did in fact entitle the petitioner to the claimed position and seniority within and during the one-year period.

SUMMARY OF ARGUMENT

Because these cases involve questions largely relating to seniority and seniority rights, we shall preface our argument with a brief discussion of the nature and sources of seniority rights. We shall point out that legal rights in connection with length of service do not spring into existence automatically, but must have their basis in a contract or a statute.

Referring then to the situation here presented, we shall demonstrate that if the petitioners have any rights to the seniority and employment status which they claim, such rights must be predicated upon a statutory basis, because (a) the complaints fail to allege the existence of any contract or of any facts which would give rise to a contractual relationship other than that of an employment at will, and (b) if the record in each case be considered as a whole, the contractual seniority systems thus disclosed fail to entitle petitioners to the status and seniority claimed, and in fact would require the rejection of their claims.

We shall then show that any purely statutory rights such as those asserted by petitioners under the Selective Training and Service Act were guaranteed by that Act for the period of one year only, and that although a denial of such rights within that period may be completely rectified, no relief may be granted for a failure to accord a veteran such rights after the expiration of the year.

And finally, we shall show that irrespective of the question of the duration of the statutory rights upon which petitioners base their claims, there were other proper grounds for dismissal of the complaints which require affirmance of the decisions of the courts below. It is our position that in neither case did the complaint allege facts showing the denial of any statutory or contractual right to the status and seniority claimed, and that the Selec-

tive Training and Service Act did not in fact confer the asserted rights even within the one-year period. We will point out that neither petitioner claims that he was not restored to the same position as that which he left to enter the armed forces, with all the rights and incidents of such position, including accumulated seniority for the period of his service in the armed forces, or that, upon being so restored, he was not considered as having been on furlough or leave of absence during that period; and that the Act did not require that petitioners be restored to completely different positions from those which they left, and accorded a seniority status which they could otherwise have obtained only by remaining "on the job" in the active service of their employers, when the seniority system in effect at the time they entered the armed forces and at the time of their return withheld such rights from non-veteran employees returning to active service from leaves of absence.

ARGUMENT

I. PETITIONERS ARE ASSERTING SPECIAL STATUTORY RIGHTS DEPENDING FOR THEIR EXISTENCE SOLELY UPON THE PROVISIONS OF THE SELECTIVE TRAINING AND SERVICE ACT.

A. Nature and Scope of Seniority Rights in General

It is well established that legally enforceable seniority rights arise out of and exist solely by reason of some contract or statute, and that their nature and scope may be determined only by reference to the provisions of the contract or statute creating them. Mere "seniority" does not bring any rights into being in and of itself. It has never been held that the mere length of the period of employment can create any legal rights in the employee in rela-

tion to that employment. This conclusion is amply supported by authority, and the rule is well stated in the case of *Ryan vs. New York Central R. R. Co.*, 267 Mich. 202, 255 N. W. 365, where the court said:

> "He (the employee) has no inherent right to seniority in service nor do such rights arise out of his employment by the railroad company except as provided for in the contracts entered into and the rules adopted by the company relating thereto." (Portion in parentheses not a part of quotation.)

This principle was recognized and the opinion in the *Ryan case* quoted with approval by this Court in the very case which forms the basis for much of our discussion here, and which was relied upon by the courts below. In that case, *Trailmobile Co. vs. Whirls*, 331 U. S. 40, 67 S. Ct. 982, 91 L. Ed. 1328, the Court's opinion contains the following explanatory footnote with reference to "seniority":

> "21
>
> Seniority arises only out of contract or statute. An employee has 'no inherent right to seniority in service . . . . . ' *Ryan vs. New York C. R. Co.*, 267 Mich. 202, 208, 255 N. W. 365; *Casey vs. Brotherhood of Locomotive F. E.* 197 Minn. 189, 191, 192, 266 N. W. 737. 'The seniority principle is confined almost exclusively to unionized industry.' Decision (1946) 46 Col. L. Rev. 1030, 1031, and authorities cited. 'In private employment seniority is typically created and delimited by a collective bargaining agreement . . . ' Ibid." (331 U. S., 53.)

This principle was reiterated and elaborated upon to some extent in the more recent opinion of this Court in the case of *Aeronautical Industrial Dist. Lodge 727 vs. Campbell*, 331 U. S. 521, where it is stated:

> "Barring legislation not here involved, seniority rights derive their scope and significance from union contracts, confined as they almost exclusively are

to unionized industry. See *Trailmobile Co. vs. Whirls*, 331 U. S. 40, 53, note 21, 91 L ed 1328, 1337, 67 S. Ct. 982. There are great variations in the use of the seniority principle through collective bargaining bearing on the time when seniority begins, determination of the units subject to the same seniority, and the consequences which flow from seniority. All these variations disclose limitations upon the dogmatic use of the principle of seniority in the interest of the ultimate aims of collective bargaining. Thus, probationary conditions must often be met before seniority begins to operate; sometimes it becomes retroactive to the date of employment; in other instances it is effective only as from the qualifying date; in some industries it is determined on a company basis, in others the occupation or the plant is taken as the unit for seniority determination; sometimes special provisions are made for workers in key positions; and then again these factors are found in varying combinations. See *Williamson & Harris, Trends in Collective Bargaining*, 100-102 (1945); *Harbison, Seniority Policies & Procedures As Developed Through Collective Bargaining* 1-10 (1941)."

It is thus clear from the above authorities[5] that petitioners cannot possess any legally enforceable right to the employment status and seniority which they claim in these cases unless it is based either on a contract or a statute.

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[5] A few of the many other cases adopting this principle are as follows: *Aden vs. Louisville & N. R. Co.*, 276 S. W. 511; *Aulich vs. Craigmyle*, 248 Ky. 676, 59 S. W. (2d) 560; *Austin vs. Southern Pac. Co.* 123 Pac. (2d) 59 (Calif. 1942); *Boucher vs. Godfrey*, 119 Conn. 622, 178 Atl. 655; *Donovan vs. Travers*, 285 Mass. 167 188 N. E. 705; *Edelstein vs. Duluth, Missabe & Iron Range Ry. Co.*, 226 Minn. 508, 31 N. W. (2d) 465 (1948); *Elder vs. N. Y. C. R. R. Co.*, 152 F. (2d) 361 (C. C. A. 6th, 1945); *Madera vs. Monongahela Ry. Co.*, 356 Pa. 460, 62 A (2d) 329 (1947); *Order of Railway Conductors vs. Shaw*, 119 P. (2d) 549 (Okla. 1941); *Polanskey vs. Monongahela Ry. Co. et al.*, 342 Pa. 188 19 A. (2d) 377; Shaup vs. *Grand International Brotherhood of Locomotive Engineers*, 223 Ala. 202, 135 So. 327.

B. Statutory Basis of the Rights Asserted By Petitioners

1. Failure of the complaints to allege any contractual rights

In each of these cases the complaint reveals absolutely no source other than the Selective Training and Service Act for the rights asserted, and the jurisdiction of the District Court was predicated upon the provisions of that statute. No contractual rights of any sort are alleged.

Petitioners have contended that this Court may only consider the allegations of the complaints in these cases, and that there was no showing that the contractual seniority system did not grant them the rights asserted. (Petitioners' Brief, p. 13-15; footnote 9, p. 33.) Insofar as the complaints standing alone are concerned, there is nothing before this Court to establish the existence of any seniority *rights* of the petitioners unless such rights are conferred by the Selective Training and Service Act alone. No "framework of a seniority system" is pleaded. Nothing in the complaints indicates whether petitioners possessed seniority rights which would have endured for a day, a month, or a year or more, if petitioners had not entered the armed forces. There is no description of the scope of any seniority rights, the privileges attendant upon them, or the manner of their exercise. Aside from references to the Selective Training and Service Act, there is no fact alleged in either complaint which would show any legal attributes of petitioners' employment other than those of an employment at will.

We submit that it was not the obligation of the respondents or these intervening defendants to establish that petitioners were *not* "enfitled to the position they claim by mere operation of the seniority system." (Petitioners' Brief, p. 13.) If petitioners wished to take advantage of the existence of a seniority system, and thus avoid the ef-

fect of the limited duration of the special statutory rights which they asserted, it was up to them to do so in their pleadings. Having refrained from pleading any seniority framework, perhaps because, as we shall demonstrate later, it was not favorable to their contentions, they cannot now ask the Court to indulge in a presumption that had they pleaded it, it would have sustained their claims.

2. Failure of the contractual seniority systems revealed by the records in these cases to entitle petitioners to the status and seniority claimed.

It may be asserted that a consideration of the entire record in each case will reveal an admission on the part of respondent that contractual rights did pertain to petitioners' employment, and that therefore their claims may not properly be classified as embodying purely statutory guarantees which would be of limited duration. At this point in our discussion we merely wish to point out that while the record in each case does indicate the existence of seniority systems governing petitioners' employment, the systems as thus revealed supply no contractual basis for the claims asserted by petitioners.

Insofar as the *Oakley* case is concerned, the seniority system revealed by the petitioner's admissions and the pleadings of the respondents not only failed to establish any contractual right in any employee to establish a retroactive seniority date under any circumstances, but positively forbade such practice. Since the only relief sought by Oakley is a retroactive seniority date at Corbin, it is clear that the record as a whole reveals no contractual basis for his claim.

With respect to the *Haynes* case, while it may be contended that the answer of the respondent C. N. O. & T. P. discloses the existence of some contractual provisions governing Haynes' employment, it not only does not establish

a contractual right in Haynes to have retroactive seniority as a helper apprentice, but is silent as to whether any seniority rights at all even pertained to the classification of helper apprentice in that respondent's employ.

It is thus clear that the employment status and seniority claimed by the petitioners is in the nature of a special statutory preference. They assert a right to be given positions different from those which they left to enter the armed forces, and say that they are entitled to "seniority" in those positions antedating the date of their return from military service. The claims thus asserted are supported by no contractual provision, and no *rights* attendant upon the claimed "seniority" are shown. Taking the view that we here advance, the courts below held that if petitioners possessed any such rights as those asserted, they would necessarily depend for their existence solely upon the provisions of the Selective Training and Service Act; and that even if that Act did create any such rights, they were of limited duration, and could not be enforced for more than one year from the date of petitioners' reemployment. This question of the duration of such statutory rights will be discussed in the following portion of our argument.

II. PURELY STATUTORY RIGHTS SUCH AS THOSE HERE ASSERTED UNDER THE SELECTIVE TRAINING AND SERVICE ACT WERE GUARANTEED BY THAT ACT FOR A PERIOD OF ONE YEAR ONLY.

As the claimed source of the statutory rights here asserted, petitioners have relied only upon certain provisions contained in Section 8 (c) of the Selective Training and Service Act. Although, as we shall point out later, we do not concede that any such rights existed at all, it is apparent that there is no other portion of the Act which could conceivably be the source of any such rights as are here asserted.

With the exception of the concluding clause of Section 8 (c), which contains the prohibition against discharge without cause, all of the provisions of the section are merely descriptive of the status to which the veteran is required to be restored. Petitioners contend that these provisions do more than impose an obligation which can be completely fulfilled by restoration to the status described. They contend that an additional statutory guarantee of a right in the veteran to *retain* the described status must be implied, and that such guarantee is of indefinite duration. It is our position that whatever may be the nature of the status and rights to which the Act requires the veteran to be *restored*, the only guarantee of any right to *retain* that status and those rights for any period of time is contained in the concluding clause of Section 8 (c) which states that the veteran "shall not be discharged from such position without cause within one year after such restoration." Thus the guarantee of the right to retain the restored status is specified to be of one year's duration only; and since the only possible basis for petitioners' claims is in the restoration provisions of Section 8 (c), the rights asserted in these cases could not be enforced for more than one year.

Throughout their argument counsel for petitioners repeatedly refer to the issue in these cases as being one of whether the Selective Training and Service Act "limited" the rights asserted to one year. Thus it is stated that "The sole provision limiting protection to a year is the guarantee that the veteran 'shall not be discharged from such position without cause within one year after such restoration.'" (Petitioners' Brief, p. 19.) We think that this is a complete misconception of the purpose and effect of the language of Section 8.

We believe that rather than constituting a limitation upon veterans' employment rights, the language quoted by

petitioners is in fact the only affirmative statutory guarantee to the veteran of any rights extending beyond the instant of his reemployment.[6] Thus, the statute provides that the veteran's employer, upon proper application, shall restore him "to such position (the position which he left to enter the armed forces) or to a position of like seniority, status and pay . . . " (Sec. 8 (b) (B); portion in parentheses not a part of quotation.) It then requires that:

> "Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) *shall be considered* as having been on furlough or leave of absence during his period of training and service in the land or naval forces, *shall be so restored* without loss of seniority, *shall be entitled* to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces . . . " (Sec. 8 (c), emphasis supplied.)

These provisions of the Act comprise all of the obligations placed upon the private employer except that referred to by petitioners as constituting a "limitation." Actually, all of these obligations can be complied with at the instant of restoring the veteran to his former position. The only continuity which they have must, therefore, be derived from the provision against discharge "from such position" for one year. In the absence of that provision, the veteran's only recourse against discharge immediately following his restoration would have to be found not in the Act, but in whatever contractual rights and incidents may have attached to his restored position.

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[6] If the veteran's restored position embodied any contractual rights and incidents, they would of course be of a continuing nature; but their continuity would be derived from, and the period of their duration fixed by the contract creating them, and not the statute.

We believe that the issue presented is governed by the previous decision of this Court in the case of *Trailmobile Co. vs. Whirls, supra,* where the Court answered in the negative the question of " . . . whether under Section 8 the veteran's right to statutory seniority extends indefinitely beyond the expiration of the first year of his reemployment, being unaffected by that event as long as the employment itself continues." (331 U. S. 51.) In that case the veteran, Whirls, not only claimed that the statute entitled him to be restored to his former position without loss of seniority, and to be free from being discharged without cause for one year thereafter, but also that it guaranteed him the right to retain his restored status and seniority for as long thereafter as his employment should continue.

The Court rejected this claim, and held that the statutory right thus asserted was of limited duration, and that the Act did not operate to preserve for more than one year any rights in connection with the veteran's restored status which were accorded him under the statute, by virtue of his veteran status, and were not possessed by his non-veteran fellow employees as a matter of contract right.

The argument set forth at pages 17 to 22 of petitioners' brief is, insofar as we can analyze it, simply a repetition of the same identical argument, with respect to severability of the concluding phrase from the other provisions of Sec. 8 (c), as that which this Court rejected in the *Trailmobile* case. Thus, at page 19 of petitioners' brief, we find the following statement:

> "But it would seem to be a gross distortion of the ordinary meaning of words to interpret a prohibition against discharge as creating a restriction upon the duration of other rights which contain no time limitation."

And at page 22:

> "It is apparent, therefore, that the one-year guarantee against discharge has its own separate scope and does not operate to shorten the life of other benefits which are conferred without time restrictions."

In rejecting this line of argument, this Court said in the *Trailmobile* case:

> "The restoration provisions define the very character of the place not only to which the veteran must be restored but equally from which he is not to be discharged. Neither grammatically nor substantively could the discharge provision be given effect without reference to the prior 'restoration' clauses . . .
>
> "To tear the concluding clause from its context is therefore impossible. It is conjunctive with all that precedes. Nor is it any the more permissible to disconnect its constituent temporal term . . . " (331 U. S., 55.)

The analogy between the *Trailmobile* case and the cases at bar may be more sharply drawn by a hypothetical change in the facts of that case. Let us assume that the agreement modifying Whirls' seniority rights had been negotiated not after the expiration of the one-year period in question, but within that period, or even during his absence in the armed forces. Assuming, as this Court did for purposes of its discussion, that such modification violated a statutory right guaranteed Whirls by the Selective Training and Service Act to have his old seniority rights restored to him, the question arises as to whether, more than one year after his reemployment, the Court would have ordered the Trailmobile Company to accord Whirls, as of that time and for the future, his old seniority. We think that it would not; and if Whirls asserted no claim for money damages suffered within the one-year period,

by reason of the withholding of his supposed statutory seniority, then just as in the instant cases, his case would have been dismissed as moot.

The distinction between the case of a veteran who claims a particular status and seniority by virtue of the statute alone, and the case of a veteran possessing a *contractual right to retain* the status and seniority to which he has been restored, is, we believe, vital to any consideration of the question of the duration of the veteran's rights in connection with his employment. If, as in the instant cases, the veteran has no *contractual rights* to retain the seniority rights which he asserts, then it cannot be said that a failure to accord him the claimed statutory rights within and during the one-year period of their duration has any detrimental effect upon his employment status after the termination of those rights. Therefore, in order to rectify the claimed violation of the statute, it is only necessary to recompense the veteran for any damage that he may have suffered during the year.

This proposition is perhaps best illustrated by the example of a simple employment at will, where no express contractual rights attached to the "position" which the veteran left to enter the armed forces and to which he is required to be restored. There is no collective bargaining agreement, and no express contract of employment guaranteeing any rights in connection with the position occupied. In such a situation the statutory rights of the returning veteran are reduced to two bare essentials: (1) the right to reemployment, conferred by Section 8 (b) (B), and (2) the guarantee of Section 8 (c) against a discharge without cause during the one-year period following that reemployment. It is thus obvious that in such circumstances, the end of the statutory year would mark the complete termination of all employment rights conferred by the Act.

It is equally obvious that in other types of employment where certain specific rights, such as seniority rights, inure to the position by reason of a collective bargaining agreement or an individual contract of employment, their continued existence beyond the one-year period in question must depend upon the continued existence of the contract. If the contract be changed, as in the *Trailmobile* case, then the rights are changed; and if it be terminated, then the rights end. We submit, then, that the reemployed veteran's *statutory* rights exist only during the one-year period, and where a veteran who has been reemployed for more than one year seeks to establish rights in connection with his employment after the expiration of that period and for the future, he is confined to the enforcement of contract rights in a contract action, and cannot predicate a cause of action on the Selective Training and Service Act.

However, we are not concerned in these cases with the situation where the veteran, if reemployed, thereafter possesses a contract right to retain the position to which the statute entitles him. In such a situation it might well be argued that in a judgment rendered after the expiration of the one-year period, a failure to accord the veteran his statutory reemployment rights could not be rectified by an award of damages suffered within the year; for the failure to secure the statutory reemployment may have deprived the veteran of contract rights extending beyond the year, if the contract remained in effect that long. In such case, *and upon a showing that had the veteran been accorded his statutory rights within the year, he would thereupon have become the possessor of contract rights, extending beyond the year, to the position claimed*, then we believe that the only manner in which a court could rectify the violation of the statute would be to require the veteran to be restored to his contract rights, with damages, if any, to the date of such restoration; or, if the con-

tract rights had terminated, by modification or expiration of the contract, prior to the entry of the court's judgment, then the court would be limited to an award of damages for the period of the statutory year plus the period thereafter up to the date on which the veteran's contract rights would thus have terminated, had he been reemployed in accordance with the statute. Such a judgment would, we believe, be justified in an action based on the Selective Training and Service Act, because the court would be rectifying a violation, or denial, of statutory rights which had taken place within the one-year period of the duration of such rights. But such a judgment would not be based upon the assumption that the statutory employment rights of the veteran were of more than one year's duration; it would merely stand for the proposition that a court may give complete relief for a violation of those rights occurring within the year. Thus, where a veteran had been accorded the reemployment required by the statute, even though his contract rights might be coextensive with his statutory rights, an alleged violation of his rights occurring after the expiration of the year (as in the *Trailmobile* case) could not be remedied by an action under the Selective Training and Service Act, since there would be no violation of that Act to be rectified; but the veteran would be left, as was Whirls, to whatever relief he might obtain for violation of his contract rights or, in an appropriate situation, for the type of discrimination which this Court held actionable in the cases of *Steele vs. Louisville & Nashville R. Co.*, 323 U. S. 192; *Tunstall vs. Brotherhood of Locomotive Firemen and Enginemen*, 323 U. S. 210, and *Wallace Corp. vs. National Labor Relations Board*, 323 U. S. 248.

It is clear from the above discussion that it is not our position, nor was it held by the courts below, that at the expiration of the statutory one-year period, all rights of the reemployed veteran with respect to his employment

automatically terminate. Such a position would of course require the conclusion that the obligation of reemployment itself, imposed by Section 8 (b), subsection B, did not contemplate that the veteran would be restored to all of the contractual rights and incidents of his former position, but merely required the furnishing of one year's temporary employment following his return from the armed forces.

We believe, rather, that whatever rights of a contractual sort (an employment relationship being essentially contractual in nature) might pertain to the restored position would be unaffected by the passing of the statutory year; but that any rights attaching to that position solely by reason of the statute, and which no contract gives the veteran the right to hold and retain, would expire, and could not be specifically enforced beyond the one-year period of their duration.

It should be noted that the proposition just set forth does not involve the imposition of a statute of limitations upon the veteran's assertion of his statutory rights. It merely makes the statutory rights of limited duration in a substantive sense. Thus, a suit brought by the veteran *under the Act* must be based on a cause of action, for denial of such statutory rights, *accruing within* the one-year period, and any *judicial relief* afforded under and pursuant to the Act may not be such as to enforce the *statutory* rights beyond the period of their duration.

It is true, as petitioners contend in their brief, pages 34-36, that insofar as the allegations of his complaint are concerned, petitioner Haynes did claim to have suffered some slight monetary damage accruing within the one-year period. We think we have made it clear that it is not our position that a claim to be recompensed for such damage is defeated by the expiration of the one-year period. However, this claim formed no part of the basis on which Haynes appealed from the decision of the District Court,

nor was this aspect of the case argued before the Court of Appeals below, or mentioned in that Court's opinion. The claim for money damages was obviously of secondary importance insofar as Haynes was concerned.

In view of this background, it is hardly proper for petitioners now to assert, as they do, that the judgment of the court below stands for the proposition that the denial of a veteran's statutory rights, whatever they may be, within the one-year period, may not constitute the basis for an award of monetary damages after the expiration of that period. And since the question of the monetary damages claimed by Haynes was never raised before the Court of Appeals, we do not believe that it may properly be presented to this Court as the basis for a reversal of the judgment below.

As their final argument, petitioners urge that in these cases the period of the statutory guarantee may not be deemed to have begun because they were never restored to the jobs to which they alleged they were entitled. (Petitioners' Brief, p. 37-39.)

This contention has no bearing on the principle issue involved in this case, that is, whether or not the special statutory rights are of limited or of indefinite duration. It goes rather to the question of the nature of the relief which a court should afford to rectify a denial of the statutory rights occurring within the statutory year, which we have already discussed at some length.

In the course of our argument we have referred to the various situations in which a court may be called upon to rectify a denial of the rights conferred by the statute. In connection with each situation we stated our belief that a court has the full power to afford complete relief for such denial, and pointed out the manner in which this could be accomplished. But the effect of petitioners' final argument is to urge that they were entitled to relief over and

above that required to make them whole for the failure to accord them the claimed rights for the one-year period of their duration.

At the time the District Court dismissed these cases, petitioners' contract rights in connection with their employment were precisely the same as they would have been had they been accorded the claimed statutory rights during the year following their reemployment, with the exception of any claim for damages that they might have had for the denial of such rights during the year. Thus, the only thing required to make them whole would be the satisfaction of that claim for damages. Oakley asserted no such claim. We have discussed the situation with respect to Haynes' claim for damages. Petitioners have urged strenuously the right of a court, in a judgment entered after the expiration of the one-year period, to award monetary damages for a denial of statutory rights within the year. We have stated our belief in the validity of that proposition. Clearly, then, if a court, in addition to satisfying claims for monetary damages suffered within the year, were to specifically enforce the alleged statutory rights for an additional year, it would be granting more relief than that required to make the veteran whole. It would, in effect, be extending the duration of the statutory rights to a period of two years, by granting damages for one year and specific performance during a second year.

It should also be pointed out that in any event, petitioners' final argument could have no application to the *Oakley* case. Oakley was in fact given a year's employment in the job to which he claimed he was entitled. Thus it cannot be said that there was a failure to restore him to the job which he claimed, which would prevent the statutory year from beginning. Even though he did not during that year have the seniority date that he claimed the statute entitled him to, he suffered no loss thereby.

III. IRRESPECTIVE OF ANY QUESTION OF THE DURATION OF THE CLAIMED STATUTORY RIGHTS, THE DISMISSAL OF THE COMPLAINTS WAS PROPER BECAUSE THE SELECTIVE TRAINING AND SERVICE ACT DID NOT AT ANY TIME ENTITLE PETITIONERS TO THE POSITIONS AND SENIORITY STATUS WHICH THEY CLAIM.

A. The Judgment of a Lower Court Must Be Affirmed, Even Though Based Upon An Insufficient Ground, If Another Ground Exists Which Is Sufficient To Sustain It.

Although it is our position that the judgments of the courts below were proper on the stated ground that these cases were moot because of the limited duration of statutory rights such as those asserted, it is our purpose to demonstrate, in this portion of our argument, that other sufficient and proper grounds existed which require affirmance of the decisions of the courts below. In substance, we propose to show that in neither case did the petitioner's complaint, considered alone, allege facts constituting a violation of any provision of the Selective Training and Service Act, and that the facts established by the record in the *Oakley* case affirmatively show a complete compliance with the Act's requirements.

This Court is not limited to passing upon the propriety of the grounds relied upon by the courts below, in determining whether petitioners' complaints were properly dismissed, but is free to affirm the judgments below on any other sufficient grounds. This rule has been authoritatively stated as follows:

> "... A reviewing court may look into the record; and if the judgment below appears to be right for any reason, it is the duty of the reviewing court to affirm it. The judgment below will be affirmed,

even though based upon a ground insufficient to warrant it, if another ground exists which is sufficient, for it is a general rule that a decision of a trial court which is correct as a matter of law will be affirmed, even though the trial court arrived at its conclusion by an erroneous process of reasoning. A judgment will be affirmed if, in point of law, it should be affirmed. A reviewing court, in the absence of statutory authority, cannot, with propriety, reverse a decision which conforms to law and remand the case for further proceedings . . . . . " (3 Am. Jur., "Appeal and Error," p. 674.)

The principles thus stated have been recognized by this Court on a number of occasions. Thus, in the case of *LeTulle vs. Scofield*, 308 U. S. 415, the Court stated:

"A respondent or an appellee may urge any matter appearing in the record in support of a judgment, but he may not attack it even on grounds asserted in the court below, in an effort to have this Court reverse it, when he himself has not sought review of the whole judgment, or of that portion which is adverse to him." (421-422; citing *Langnes vs. Green*, 282 U. S. 531, 535-537; *Helvering vs. Gowan*, 302 U. S. 238, 245; and *Ticonic Nat. Bank vs. Sprague*, 303 U. S. 406, 410, note 3, in support of the proposition urged by us.)

And in the case of *Ryerson vs. United States*, 312 U. S. 405, the Court said:

"As the Government has not sought *certiorari* it cannot attack the judgment below, but is free to sustain it upon any legal ground which will support it . . . . . " (408, citing the *LeTulle* case, *supra*.)

B. The Selective Training and Service Act Did Not Entitle Petitioners to the Positions and Seniority Status Which They Claim.

The issue involved in this portion of our discussion is one which has not previously been before this Court. It has, however, been the subject of a great deal of litigation, and the courts which have passed upon it have in most cases decided it adversely to the position taken by the petitioners in these cases. Unless the instant case be excepted, the Government, in its role of counsel for veterans asserting reemployment rights, has never to our knowledge sought a review by this Court of any of those decisions.

Nevertheless, the argument on behalf of petitioners is replete with statements which infer that there is not even any question as to the existence of the alleged rights which they seek to enforce, and that the question of the duration of the alleged statutory rights is the only conceivable obstacle to the relief which is sought. For this reason, as well as because we feel that the proposition advanced by us is sound, we have felt compelled to urge that this Court must sustain the decisions of the courts below on the basis of the non-existence of any such statutory rights as were asserted by petitioners, irrespective of the question of the duration of rights derived solely from the statute.

1. Theory of the Complaints

It is evident from an examination of the complaints in these cases that in neither instance does the petitioner claim that he was not reemployed in the same position which he left to enter the armed forces, or that he was not thereafter accorded all of the rights and incidents pertaining to such position. Instead, both petitioners claim that they were entitled, by virtue of the Selective Train-

ing and Service Act, to be given positions and seniority status entirely different from their former positions and the seniority status which they had formerly held in those positions (augmented by the period of their service in the armed forces).

Thus, it appears that when he entered the armed forces, Oakley left a position as a machinist in the employ of respondent L. & N. at Loyall, Kentucky, with employment in that position dating from 1943. In his complaint he asserts the right to be restored to a position as a machinist at Corbin, Kentucky, with seniority at that point dating from July 1, 1945.

Haynes alleges that he left a position as a machinist helper in the employ of respondent C. N. O. & T. P. at Somerset, Kentucky, in which he had been employed from on or about July 6, 1940, to February 1, 1942, and that upon his return from the armed forces he was reemployed in the same position, but was entitled by the Act to be restored to a position as helper apprentice and given all pay increases that had been received by persons employed as helper apprentices since February 1, 1943.

Both complaints proceed upon the theory that the Selective Training and Service Act entitled the petitioners to be restored not to their former positions which they left to enter the armed forces, but to other and different positions which they say they would have obtained had they remained in the employ of respondents instead of entering the armed forces. Oakley states that he was entitled to be restored to the "seniority he would have had had he not served in the Armed Forces of the United States, and remained in the continuous employment of the defendant." (O. R. 2.) Haynes says that "said employment of machinist helper was not the employment to which he was entitled had he been given the seniority that he would have

had, had he remained in the employment of the company during the period of his service in the Armed Forces." (H. R. 2.)

Implicit in the theory of the complaints in these cases is the assumption that in determining what positions and seniority status must be accorded to returning veterans, they must be considered as having been working *"on the job,"* in the active service of their employer, during the period of their military service. That this proposition constitutes the basis for petitioners' claims to the employment status and seniority which they seek here is stated time and again in petitioners' brief. Thus, at page 9 of their brief, the right here asserted is described as follows:

> " . . . . the right, under Section 8 of the Selective Service Act of 1940, *to have time in the military service credited as time on the job. . . .* " (Emphasis supplied.)

Similar statements appear throughout petitioners' brief. The following are illustrative:

> " . . . . They seek . . . to have their period of military service treated as time *on the job. . . .* " (Page 12.)
>
> " . . . . the statutory protection requiring the period of military service to be counted as time *on the job. . . .* " (Page 15.)
>
> "Thus the veteran's right to be restored to his job without loss of seniority assures him that he will be treated the same as similarly situated employees who remained *on the job.*" (P. 19.)
>
> " . . . . the *plain mandate of the statute* that military service must be treated as the equivalent of time *on the job. . . .* " (Page 33.)

It is our position that the returning veteran is not required to be treated as if, during his absence in military service, he had in fact remained "on the job," in the active

service of his employer. We contend rather that the Selective Training and Service Act only requires that the veteran be treated as if he had been on furlough or leave of absence from his employment during the period of his military service. And where, as in these cases, there is no claim that the veteran would be entitled to the position and seniority status sought if he be considered as having been on furlough or leave of absence, the claim to such position and seniority status is not sustained, under the Selective Training and Service Act, by the assertion that he could or would have achieved the position and status had he been "on the job."

This Court has not previously had occasion to consider the question thus presented. In all of the previous cases involving disputes as to the position and seniority status to which a returning veteran was entitled, it has been completely immaterial whether he was considered as having been on furlough or leave of absence, or as having been on the job. In the cases of *Fishgold vs. Sullivan Drydock & Repair Corp.*, 328 U. S. 275, *Trailmobile Co. vs. Whirls, supra*, and *Aeronautical Industrial Dist. Lodge 727 vs. Campbell, supra*, it was unnecessary to draw this distinction for purposes of the Court's decision. But none of those cases involved a claim to a different position from that which the veteran left to enter the armed forces. Where such a claim is advanced, the distinction becomes vital.

That there is a distinction between the situation of an employee on "furlough or leave of absence" and the situation of one who is at work or "on the job," has been definitely recognized by this Court. Thus, in its opinion in the *Fishgold* case, *supra*, the court described a "furlough" and a "leave of absence" as constituting "types of cessation of work," and said that each constituted "a form of layoff." (328 U. S., 287.) Describing these terms further the Court said:

> "An employee on furlough or on leave of absence has a continuing relationship with the employer; he retains a right to be *restored to work* under specified conditions. Thus, when Congress decided to cover the contingency of a lay-off it used apt words to describe it." (328 U. S. 287; emphasis supplied.)

The concept of being at work on the job is, we submit, diametrically opposed to that of a cessation of work or a layoff.

2. *The language of the statute fails to support petitioner's claims*

Although petitioners predicate their actions upon the Selective Training and Service Act, they have not specified any particular provision of the Act which would confer upon them the rights which they seek to enforce.

The Act requires that in the case of a veteran who left a position, other than a temporary position, in the employ of a private employer, "such employer shall restore such person *to such position* or to a position of like seniority, status and pay." (Sec. 8 (b) (B); emphasis supplied.)[7]

But petitioners claim that when Congress said the veteran must be restored to his former position that is not what it meant; that it intended rather, that the veteran must be restored *not* to his former position, but to a different position which he could or would have obtained, or to which he would have been promoted, if he had remained on the job instead of entering the armed forces. We do not agree that the quoted portion of the Act is subject to an interpretation which is so much at variance with the actual language used by Congress. On the contrary, subsequent

[7] In quoting the "pertinent portions of Section 8" petitioners fail to include that portion of the phrase quoted here which is preceded by the conjunction "or." (Petitioners' Brief, p. 17.)

portions of the Act contain language which, in our opinion, directly precludes any such interpretation.

Having set up the requirement that returning veterans must be restored to their former positions, Congress then went on to define precisely the status and rights of persons so restored. In so doing it provided in Section 8 (c) of the Act, that:

> "Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) *shall be considered as having been on furlough or leave of absence during his period of training and service in the land or naval forces.*"

We can scarcely conceive of any language by which Congress could more definitely have rejected the contentions of petitioners.

There is no suggestion that the petitioners in these cases have not been treated as if they had been on furlough or leave of absence, and it is apparent that it is that treatment of which they complain. They say they should be treated in precisely the opposite manner, and given the positions and seniority which they would have obtained had they remained at work, on the job, instead of entering the armed forces. In other words, they seek to have the Act interpreted as having a meaning exactly opposite to what it expressly and unambiguously provides.

When it enacted the Selective Training and Service Act, Congress conferred and imposed novel and unprecedented rights and obligations upon employees and employers in private industry. It is indeed incredible that had it intended these rights and duties to go so far as petitioners claim, it would not have adopted express language to that end, rather than to attempt to achieve such a result by the use of words to which only an exactly opposite meaning may be ascribed.

3. The legislative history of the statute indicates no Congressional intent to confer the rights claimed by petitioners.

We have been unable to find anything in the legislative history of the Selective Training and Service Act which shows that Congress intended the result for which petitioners contend, or that the issue with which we are concerned was specifically considered prior to the enactment of the statute. In fact an examination of the legislative history reveals an almost total lack of discussion of reemployment rights, both in the committee hearings and on the floor of Congress. What little mention there was of the reemployment provisions was largely of an "inconclusive character," as this Court observed in *Trailmobile Co. vs. Whirls, supra.* (331 U. S. 61.)

Very little of the discussion of the legislative history contained in petitioners' brief has any bearing on the issues involved in these cases. However, the references which appear at page 25 of petitioners' brief if anything tend to refute rather than support their contentions here. If there is anything in the amendment to Section 8 (c) set forth by petitioners, or in Chairman May's statement that "we put them on furlough during the time they are in the service," which lends support to petitioners' claims in these cases, we fail to discern it; for they are here contending that Congress did not intend that they should be considered as having been on furlough or leave of absence, during the period of their military service, but rather that they should be considered as having been at work, on the job, during the period of their absence.

4. The interpretation of the statute required to support petitioners' claims has been rejected by sound judicial authority.

As we have indicated, the question of whether the "furlough or leave of absence" test, or the "on the job" test, should be applied to determine the employment status and seniority rights of a returning veteran has not been specifically passed upon by this Court. It has, however, been litigated on numerous occasions, and in almost every instance the court's decision has been that the furlough or leave of absence test is the one to be applied. A number of the United States Courts of Appeals have so held, and we shall refer first to some of these decisions.

The case of *Trischler vs. Universal Potteries, Inc.*, 171 F. (2d) 707, decided December 14, 1948, by the Court of Appeals for the Sixth Circuit, involved claims based on the same theory as those of petitioners here, and the factual situation presented is strikingly familiar to that in the *Haynes* case. In that case, one of the plaintiffs had been an apprentice when he entered the armed forces, and claimed employment as a journeyman upon his return. The remaining plaintiffs, who had not yet obtained apprenticeships at the time of their induction, claimed the right to displace individuals who, during their absence in military service, had received apprenticeships which plaintiffs would have been entitled to receive by virtue of their seniority had they not been absent. (For detailed facts, see District Court opinion, 78 F. Supp. 609.) In affirming the District Court decision denying these claims, the Court of Appeals applied the furlough or leave of absence test; ruling that the veterans had failed to establish that upon being re-employed, they had not been considered as having been on furlough or leave of absence during the period of their military service.

In the case of *Spearmon vs. Thompson*, 167 F. (2d) 626, the Court of Appeals for the Eighth Circuit denied the claim of one of the plaintiffs, Delozier, to be reemployed in a mechanic's position to which he would have been upgraded, from his former position as helper, had he remained on the job instead of entering the armed forces. Delozier's claim was predicated upon precisely the same theory as those of the petitioners in the instant case. In denying it, the Court of Appeals stated as follows:

> " . . . Although it is stipulated that had he remained in the position of helper until November 2, 1942, he would on that date have been advanced to the position of mechanic, it is a conceded fact that he occupied the position of helper at the time of his induction. The seniority which accrued to him during the time he served with the armed forces was seniority in the position of helper and not as mechanic. Since he was restored to the position of helper upon his return, he can have no just complaint that his rights under the Selective Training and Service Act have not been fully accorded to him." (167 F. (2d), 631-632.)

It is clear that in the *Spearmon* case, the court held that the Act did not require Delozier to be given the promotion that he admittedly would have gotten had he remained on the job instead of entering the armed forces. Delozier's petition for a writ of certiorari was denied by this Court on December 6, 1948. (*Delozier vs. Thompson*, No. 359, October Term, 1948; 93 L. Ed. (Adv.) 126.)

Among other cases applying the furlough or leave of absence test are those in which the courts have held that the question of whether a reemployed veteran is eligible for vacation pay during the first year after his return depends not on whether he would have been so eligible had he remained at work instead of entering the armed forces, but

on whether he would have been eligible had he been on furlough or leave of absence during the period of his military service. Among these cases are two decisions by the Court of Appeals for the Second Circuit, *Dwyer vs. Crosby Co.*, 167 F. (2d) 567, and *Siaskiewicz vs. General Electric Co.*, 166 F. (2d) 463, and a very recent one by the Court of Appeals for the Third Circuit, *Dougherty vs. General Motors Corp.*, No. 9785, August 8, 1949, unofficially reported at 24 L. R. R. M. 2369.[8]

And in a case involving a similar question, *Seattle Star vs. Randolph*, 168 F. (2d) 274, the Court of Appeals for the Ninth Circuit held that time spent in the armed forces was not to be considered as time worked in private employment for the purpose of computing a reemployed veteran's severance pay. In so holding, the court said:

> "It is argued that unless the contract be so interpreted as to permit appellees' time in the armed services to be considered as full time employment, said contract conflicts with Section 8 (c) of the Selective Service and Training Act and is against public policy. Such a contention is diametrically opposed to the plain reading of Section 8 (c) and gives no effect to the requirement that the determination shall be made on the basis of the rules applicable at the time of induction to those on furlough or leave of absence. *Feore vs. North Shore Bus Co., Inc.*, 2 Cir., 161 F. 2d 552." (168 F. (2d), 276.)

The case of *Raulins vs. Memphis Union Station Co.*, 168 F. (2d) 466 (C. A. 6th. 1948), affirmed the dismissal of claims of electrician helpers to positions as journeymen electricians which they asserted they would have obtained had they remained at work instead of entering the armed

[8] Reference is to Labor Relations Reference Manual, a publication of the Bureau of National Affairs, Washington, D. C.

forces. The following language from the court's opinion is particularly relevant to the issue under discussion:

> "If the appellants had been on furlough or leave of absence, instead of in the service, when the vacancies occurred, they would not have obtained the promotions which they are now claiming. *Section B of the Act provides that the employee shall be considered as having been on furlough or leave of absence during his period of training.* Rule 13 of the Collective Bargaining Agreement, dealing with leave of absence, provided for such a leave for a period not exceeding 30 days with privileges of renewal, but made no provision that an employee who has been absent upon leave may upon returning exercise those rights that would have been available to him if he had not been absent." (Emphasis supplied.)

Also in point is the case of *Special Service Co. vs. Delaney*, 172 F. (2d) 16 (C. A. 5th, 1949), where the court said:

> ". . . . although the returning service man is entitled to the same job he had on leaving for military service, he is not entitled to promotions received by his successor during his absence. . . . "
>
> ". . . . . The law is clear that under the statute, 50 U. S. C. A. Appendix, Sec. 308, the employee is entitled to his old job or an equivalent job, but is not entitled to advance to a higher classification, in the absence of some particular agreement of employment, during his service with the Armed Forces. . . . " (172 F. (2d), 19.)

As we stated at the outset, this Court has not as yet had the issue under discussion before it for decision. But the petitioners apparently rely, as did the veterans in all of the cases which we have cited, upon certain language in the Court's opinion in the case of *Fishgold vs. Sullivan Drydock & Repair Corp., supra*, to support their claim that

the "on the job" test must control their rights. (Petitioners' Brief, pp. 30, 34.) We believe, however, that insofar as it relates to the facts of these cases, the *Fishgold* case supports our position.

In this connection, we think that the following language from the opinion of the Court of Appeals in the *Fishgold* case serves to point up the statements in this Court's opinion which are pertinent to this discussion:

> " . . . The phrase, 'like seniority' means the 'same seniority' as before; and it necessarily precludes any gain in seniority. It follows that, if the original position is no longer open, the substitute shall be a position of no greater, though no less, seniority than the last position. But if that be true, there can be no implication that, if the original be not lost, but be still available, the veteran shall be restored to it with a gain in priority; for that would pre-suppose that Congress did not intend the substitute to be as nearly a complete substitute for the lost original as it was possible to make it, a hypothesis absurd on its face. Hence we must start with the proposition that subsection B of Section 8 (b) not only did not grant any step up in seniority, but positively denied any.
>
> "Subdivision (c) confirms the intention so disclosed. As subsection B reads, it would probably be understood to restore the veteran only to that same position which he held when he was inducted. That was, however, thought to be unfair; for while he was in the service, there were likely to be such changes in the personnel that when he came back, he might find himself junior to those over whom he had had priority when he left. To remedy this, by an amendment made while the bill was in Congress, *he was given the same status that he would have had, if he had been 'on furlough or leave of absence' while he was in the service. How far that differed from his position, had he remained actively at work,*

does not appear; but clearly the amendment presupposed that a difference there might be. Having in this way declared how the veteran's interim position 'shall be considered,' Congress added that he should be 'restored without loss of seniority.' Had the purpose been, not only to insure the veteran *that he should not lose any more steps upon the ladder than if he had been on leave,* but also that he should go to the top, we cannot conceive that Congress would have expressed itself in the words, 'without loss of seniority.' They have no such express meaning, and their implications are directly the opposite; for they disclose a *concern against his possible demotion inconsistent with any implied belief in his promotion. . . .*" (Emphasis supplied.) (*Fishgold vs. Sullivan Drydock & Repair Corp.*, 154 F. (2d) 785, 788.)

In the light of the above quoted statement, the portion of this Court's opinion referring to the opinion of the Court of Appeals would seem to refute any contention that the "on the job" test controls. Thus, this Court said:

". . . We agree with the Circuit Court of Appeals that by these provisions Congress made the restoration as nearly a complete substitute for the original job as was possible. No step-up or gain in priority can be fairly implied. Congress protected the veteran against loss of ground or demotion on his return. The provisions for restoration without loss of seniority to his old position or to a position of like seniority mean no more." (328 U. S., 286.)

It is true that in the *Fishgold* case the Court said that the returning veteran " . . . . does not step back on the *seniority* escalator at the point he stepped off. He steps back on at the precise point he would have occupied had he kept his position continuously during the war. . . . He acquires not only the same *seniority* he had; his service in

the armed forces is counted as service in the plant so that he does not lose ground by reason of his absence. . . . " (Emphasis supplied.) But the only question before the Court was that of seniority, and as we understand these statements, they were made with reference only to the *amount of seniority*, or *number* of years, months and days, with which the veteran must be credited upon his return. There is nothing in the facts or issues of the *Fishgold* case to indicate that anything more was intended, or that the Court meant that service in the armed forces must be counted as service in the plant for any other purpose than that of computing the amount of senority held by the veteran upon his re-employment.[9]

Although, again, this immediate question was not involved, we believe that this Court's opinion in *Aeronautical Industrial Dist. Lodge 727 vs. Campbell, supra*, goes far to indicate that the furlough or leave of absence test is controlling. There the Court said:

> " . . . . the Act gives him (the veteran) the status of one who has been 'on furlough or leave of absence' but uninterruptedly a member of the working force on whose behalf successive collective agreements are made. In this way the Act protects the furloughed employee from being prejudiced by any change in the terms of a collective agreement because he is 'on furlough,' but he is not to be favored as a furloughed employee as against his fellows. This is the essence of our decision in *Fishgold vs. Sullivan Drydock & Repair Corp.*, 328 U. S. 275." (Portion in parentheses not a part of quotation.)

Insofar as we have been able to ascertain, the case of *Conner vs. Pennsylvania Railroad*, 24 L. R. R. M. 2362

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[9] For an excellent discussion disposing of contentions similar to petitioners' with respect to the language of the *Fishgold* opinion, see *Woods vs. Glen Alden Coal Co.*, 73 F. Supp. 871, 874-875.

(C. A. D. C., August 1, 1949), cited by petitioners, is the only case which is clearly opposed to the numerous authorities which we have cited in support of our position on the issue under discussion. The case of *Morris vs. Chesapeake & Ohio Ry. Co.*, 171 F. (2d) 579, in which this Court denied certiorari (October Term, 1949, No. 638, cert. den. May 2, 1949; rehearing den. June 6, 1949), can scarcely be said to support petitioners' position with respect to the "on the job" test in view of the position taken in the brief filed with this Court by the respondent in opposition to the petition for certiorari. There, respondent argued to the effect that the rights asserted by him were simply those accorded by the contractual seniority system to non-veteran employees returning from leave of absence. (See pages 26-27, 30-31, 32-35, of brief for respondent Morris.) And the case of *Mentzel vs. Diamond*, 167 F. (2d) 299 (C. A. 3rd). cited by petitioners, can scarcely be considered as authority for their position in view of the subsequent decision by the same Court of Appeals in the case of *Dougherty vs. General Motors Corp., supra.*

5. The record in the Oakley case affirmatively shows that the petitioner was accorded all rights guaranteed by the statute.

We have pointed out that in *neither* of these cases does the petitioner's complaint, either on the basis of the facts alleged or the theory underlying the action, establish the existence of a statutory right, even within the one-year period, to the position and seniority status claimed. In addition, we will show in this concluding portion of our memorandum that it affirmatively appears that petitioner Oakley did in fact receive every right to which the Act entitled him.

It is apparent from the record in the *Oakley* case that certain facts appear by answers, admissions and support-

ing affidavit which would have required the District Court to sustain the motion for summary judgment (O. R. 12) had the motion to dismiss the complaint not been sustained. It is our position that even though the courts below arrived at their decisions on the basis of the motion to dismiss, this Court is empowered to consider the entire record and affirm the decisions below if the same result would have been achieved by a proper granting of the motion for summary judgment.

The position which Oakley left to enter the armed forces was that of a machinist at the Loyall, Kentucky, shops of respondent L. & N. As an incident of that position he had, by virtue of a collective bargaining agreement between his employer and respondent System Federation No. 91, certain seniority rights which guaranteed him specified preferences over other machinists whose seniority date, or date of original employment at Loyall, was subsequent to his. His seniority date at Loyall was July 6, 1943. The agreement confined seniority rights to the point on the railroad where the individual was employed. (O. R. 6, 11—Adm. No. 23.)

Upon his return from the armed forces and application for reemployment, Oakley was restored to the same position as a machinist at Loyall, and accorded his same seniority date of July 6, 1943. (O. R. 13, Affidavit of H. Feather; 5, 10—Adm. 15 and 18.) However, by the operation of the contractual seniority system there was no work available for him at Loyall (O. R. 5, 10—Adm. No. 16), so that his status was that of a furloughed employee at that point. Under the ruling of this Court in the *Fishgold* case, *supra*, he was thus restored to his former "position" within the meaning of the Selective Training and Service Act. And he was restored to it without loss of seniority because, under the seniority system in effect, the restoration of his old seniority *date* in effect gave him

full seniority credit for the period of his absence in military service.

Among the incidents of the position which Oakley left and to which he was restored was the right, when furloughed from that position, to be given preference if he wished to transfer to another point on the railroad where additional men were needed. (O. R. 6, 11—Adm. No. 23.) Oakley applied for and received a transfer to a position as machinist at Corbin. In accordance with the provisions of the agreement, he was given a seniority date at Corbin as of July 18, 1946, the date on which he commenced work there (O. R. 5, 10—Adm. No. 12 and 13), and at the same time retained the right to elect whether he would return to Loyall, still keeping his furloughed status and his old seniority date at that point, should he be recalled to work in accordance with his seniority there. (O. R. 5, 10—Adm. No. 18.)

The treatment thus accorded Oakley upon his return and reemployment was precisely the same as that to which the contract would have entitled him had he been on leave of absence from the employ of respondent L. & N. during the period of his military service. The seniority system prohibited any employee from being given retroactive seniority antedating the date of commencing work at any point. (O. R. 6, 11—Adm. No. 23.)

There is no suggestion anywhere in the record that Oakley's status or seniority as set forth above was changed in any respect from the date of his reemployment to the date of the District Court's judgment dismissing his complaint, or thereafter, for that matter. If any such change had occurred, it would have been incumbent upon Oakley to bring it to the attention of the court, particularly in view of the pending motion for summary judgment. It is therefore fair to assert that Oakley has not been discharged or demoted from the status and seniority to which he was restored.

It is clear from the above recital of the facts disclosed by the entire record that Oakley was accorded every right guaranteed him by Section 8 of the Selective Training and Service Act. Paraphrasing the requirements of Section 8, Oakley was restored to the position which he left to enter the armed forces; was, upon being so restored, considered as having been on leave of absence during the period of his military service; was so restored without loss of seniority; was accorded all benefits offered by his employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect at the time he entered the armed forces; and was not discharged from such position within one year after such restoration.

We therefore submit that the motion of respondent L. & N. for summary judgment was well taken, and would properly have been granted by the District Court had it not sustained the motion to dismiss.

CONCLUSION

We have shown that in these cases petitioners are asserting claims which have no contractual basis, and which, if they were valid, would necessarily be purely statutory in nature. We have further demonstrated that any purely statutory rights guaranteed by the statute upon which these claims are based, the Selective Training and Service Act, exist for one year only, and may not be enforced beyond the period of their duration. Therefore, we concluded that the courts below ruled correctly in refusing to grant relief for a failure to accord such rights to petitioners after their expiration.

We have also pointed out that irrespective of any question of the duration of the rights asserted, such rights did not in fact exist, and that the decisions of the courts below should therefore be affirmed irrespective of the

grounds upon which they were predicated. In this connection we demonstrated that upon the basis of the facts alleged and the theory of petitioners' actions, neither complaint stated a cause of action for relief under the Selective Training and Service Act; and that the entire record in the *Oakley* case affirmatively established a full compliance with the requirements of the Act and hence would require the granting of the motion for summary judgment filed therein.

It is therefore respectfully submitted that the decision of the Court of Appeals in both of these cases should be affirmed.

Respectfully submitted,

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October 8, 1949.

CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing document upon all parties of record herein on the 8th day of October, 1949, by mailing copies thereof to the Solicitor General of the United States, counsel for petitioners John Walter Oakley, Jr., and John S. Haynes; Mr. Carl M. Jacobs, Mr. Cornelius J. Petzhold, and Mr. W. S. Macgill, counsel for respondent Cincinnati, New Orleans and Texas-Pacific Railway Company (Southern Railway System); and Mr. C. S. Landrum and Mr. H. T. Lively, counsel for respondent Louisville & Nashville Railroad Co.

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